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Current Topics.

Use of Models in Evidence.

IN the recent case of *Lewis* v. *Denye* in the House of Lords, the Lord Chancellor made an exceedingly practical comment regarding the trial of actions in which it has been necessary for a model of the machine under discussion to be used to illustrate its working. The case under consideration was concerned with injury caused to a workman by a circular saw which was alleged to have been insufficiently fenced. A model of the saw was in court at the trial and demonstrations of its use were given by various witnesses. It was in relation to the evidence thus given that the Lord Chancellor's observations were directed, and they deserve to be borne in mind in all such cases in view of the possibility of an appeal. As the Lord Chancellor said, those professionally engaged in such a case are unfortunately apt to forget that the demonstratives, "this" or "that," or "here" or "there," used by the witnesses in relation to the model or to this or that part of it, while illuminating the understanding when the eye can follow a moving finger or a wave of the hand, convey little, if any, information when the gaze of the appellate court is restricted to the still life of a shorthand note. This very practical criticism should certainly be borne in mind by those examining and cross-examining witnesses in such actions, at all events where there is the probability, or even the possibility, of the case being carried beyond the court of first instance.

The Divorce Lists.

SIR BOYD MERRIMAN, P., reviewed last Tuesday the position with regard to the lists of divorce causes. A comparison with the corresponding figures on the eve of the Long Vacation last year revealed, he said, a better situation than at any time since the Matrimonial Causes Act, 1937, came into force. All cases in the current term's undefended list ready for trial would have been disposed of at the end of the week. The cases set down since that list was closed numbered about 600, as against 1,100 on the corresponding date last year, and all those cases had been set down since the end of April. Over 500 of the 722 defended cases in the current term's list had been disposed of, and the defended cases since set down brought the total awaiting trial to 500, as against 1,050 for the corresponding period last year. The learned President observed that even more satisfactory was the fact that, whereas last year the Divorce Division was dealing with defended cases set down at the beginning of December, 1938, it was this year dealing with cases set down in the middle of April, 1940. Against that must be set the fact that, owing to difficulties created by the war, about sixty undefended and about 100 defended cases in excess of the usual numbers had passed into the reserved list. Even with that qualification, however, the improvement in the list, which had been a source of anxiety, was very marked.

Building Society Mortgagees: Specifying Remedy.

The Times of 25th July records certain observations made by BENNETT, J., in the course of a judgment on an application by a building society which sought leave under the Courts (Emergency Powers) Act, 1939, to exercise in relation to mortgaged property any remedy available to it by way of taking possession, realisation of the security and costs. The learned judge said that the summons was on a printed form, and when the applicants were before the Master it was agreed that that was not the order which they wanted at all, but that they wanted an order giving leave to appoint a receiver. His lordship continued: "It is a very great pity in actions of this kind that, instead of using printed forms asking for relief which they do not intend to ask for and do not want, building societies do not issue a summons asking for the relief which they do want and confining their applications to that relief. In a great many of these cases the respondents are persons who are buying their houses with the help of money borrowed from building societies, and when such persons read summonses indicating that applications for leave to take away their homes are going to be made they are, not unnaturally, very disturbed in their minds. From the letters which one receives almost daily it is quite clear, and I am quite satisfied, that such persons are gravely disturbed." The learned judge concluded his observations on this point by saying that it would be better for everybody if building societies not wanting that form of order stopped issuing summonses asking for it "as a matter of form."

Emergency Powers (Defence) (No. 2) Bill.

THE Emergency Powers (Defence) (No. 2) Bill was read a second time in the House of Lords on Tuesday. The LORD CHANCELLOR dealt with the Home Secretary's provisional suggestions for the provision for the review, in serious cases, of the decisions of the special courts authorised to be set up by the measure. It was proposed, he said, that there should be a panel of judges of the highest possible standard from whom could be drawn individuals to review serious sentences. In England those might be members of the Court of Appeal and the Law Lords. LORD SIMON went on to explain that the proposal was that three members of this higher panel should act as a body to review in every case of sentence of death; and in every other case, where a President of the court certified that a case involved questions of law or fact, or for any other reason, should properly be reviewed. It was also to include provisions by which the same kind of action could be taken as was taken in the Court of Criminal Appeal. The discretion which rested on the Home Secretary of advising the Crown on the prerogative of mercy would not, it was intimated, be removed. LORD ATKIN and LORD ROCHE expressed approval of the measure. The former said that it was quite without precedent for Parliament to confine to the executive the power to create new courts with powers of life and death without any provision in the Bill itself to qualify

the nature of the jurisdiction, but the learned lord was satisfied, having regard to the assurances given by the responsible Ministers of the Crown, that the ordinary safeguards of justice which existed in the present courts would be maintained. He regarded the power of review as entirely satisfactory, but suggested that it might be extended to other sentences than the death sentence. LORD ROCHE supported the Bill as a proper measure for the safety of the country and not one impinging on the proper liberty of the subject. Replying to the debate, the Lord Chancellor observed that, strictly speaking, there was no need for the Government to introduce the Bill, because they could do the whole thing by Orders in Council under the Defence Regulations, but the Government took the view that, as they were dealing with the rights and liberties of ordinary citizens, it would be a monstrous thing to use that power without bringing it before the attention of Parliament.

Income Tax: Deduction at Source.

BRIEF reference should be made to Captain CROOKSHANK'S recent statement in the House of Commons on certain points arising with reference to the subject of income tax deduction. The first point dealt with was the difficulty created by the raising of the standard rate during the financial year. Although the new standard rate of 8s. 6d. in the pound was to apply to the whole of the income tax year, it was not, the Financial Secretary to the Treasury intimated, legally operative until the date of the passing of the Finance Act. Tax could accordingly be deducted up to that date at the rate of 7s. 6d. That might lead to complications in the case of companies which had already prepared warrants with deductions at the old rate, the payment of which might take place after the passing of the Finance Act. Such companies might find it impracticable to destroy the warrants and make out new ones. The Finance Act would therefore contain a provision legalising deductions by reference to the rate of 7s. 6d., although made after the passing of the Act, provided that such course was not adopted after 1st September. Provision would also be made for adjustments in regard to tax payments made before the passing of the Finance Bill. Captain CROOKSHANK also explained that the proposal to make compulsory the deduction of income tax from salaries and wages was confined to tax collected under Sched. E. The assessment to tax would be made as at present by the Inspector of Taxes, and the employer would be notified how much tax was due on 1st January next. In the case of yearly assessments the notifications would be received some time in October, and the employer would make deductions in instalments from November to April, and (in respect of tax due in July) from May to October. In the case of weekly wage earners, no deduction will be made until the tax is due. Assessments in these cases are on a half-yearly basis and deductions will be made in the periods of six months beginning 1st January and 1st July. It was observed that weekly wages might be subject to considerable fluctuations, and that in order to prevent hardship it was proposed that no deductions should be made which would reduce the real earnings in any week to an amount less than £2. If a firm went bankrupt nothing would happen to the detriment of the taxpayer, but the tax collected by the firm would be a debt due to the State. The employer would have to pay to the Exchequer the amount he had collected during any month not later than the 15th of the next month. Refunds would be made by the income tax authorities in the ordinary way.

Income Tax on Mortgage Interest.

THE July issue of *The Law Society's Gazette* contains an important note of the results of a discussion which took place between members of a deputation from the council of that body and representatives of the Board of Inland Revenue concerning the practical difficulties in which solicitors are placed by reason of the decision in *Howells* v. *Inland Revenue Commissioners* [1939] 2 K.B. 597. Our contemporary states that the council has agreed with the board that the following course may be adopted so that a solicitor may be in a position to recover from the proceeds of sale of mortgaged property income tax that he has to pay on an assessment raised under r. 21 of the All Schedules Rules. The solicitor should ask the inspector of the district in which the property is situate whether liability under the above cited rule arises on the sale, accompanying his request with a statement giving the address of the property, the name and address of purchaser and vendor, the proposed date of completion, particulars of any ground rent and of all mortgages (if known) affecting the property, including the amounts, rates of interest, names and addresses of mortgagees, amount of interest due, including arrears, and an indication of the sum likely to be available to meet interest and tax when principal and expenses have been covered. A further statement may be added indicating whether the sale is at the instance of the mortgagor or in exercise of the mortgagee's statutory powers. The board has instructed its inspectors that particulars of this nature headed "Sale of Property: Rule 21 Enquiry" should receive priority so as to ensure within a fortnight a reply to the effect that in the Department's view liability under r. 21 does arise, does not arise, or is doubtful. In the first and third cases the solicitor should retain the tax on any interest paid by him and notify the inspector as to the date of the transfer of the property and as to how the sale price has been allocated. The inspector will then arrange to have an assessment raised. This procedure applies to a sale by a mortgagor whose solicitor repays out of the purchase money principal and interest, and to a sale under the statutory power by a mortgagee whose solicitor out of the purchase money repays the principal and interest and hands over the balance to the mortgagor. It is stated that no liability under the rule will be claimed, and therefore no inquiry will be necessary, in a case where the mortgage or mortgages affecting the property to be sold are made in favour of a building society, under an arrangement with the Board of Inland Revenue, as regards payment of interest in full without deduction of tax. It appears that these arrangements are in the nature of an experiment and are open to review when sufficient time has elapsed for testing their efficacy. We desire to express our indebtedness to our contemporary for the above information.

Defence Works: Notice to Occupier.

MR. W. P. SPENS, K.C., recently asked the Secretary of State for War in the House of Commons whether, when possession was taken for the purposes of military defence of unoccupied houses, or land, or timber, or other property in any area, any notice was either required to be given or was in fact given to the owner or anyone else; and, if no such notice was given, whether the Secretary of State for War would arrange for written notice to be given to the clerk of the local authority in which such property was situate, so that there might be some written record available to owners of property so taken. In reply Mr. EDEN stated that, when possession was taken of a property, or when work was done on it, the serving of a notice was not required by law, though in fact a notice was served on the occupier wherever possible, and the War Office had recently drawn the attention of General Officers Commanding-in-Chief to that procedure in connection with the programme of defence works. He observed, however, that there were many thousands of such works and their construction was of the first urgency. It was possible, therefore, that the serving of notices was sometimes delayed.

Compensation.

A FEW days later Mr. SPENS asked whether, where it was necessary in any area to require the owners or occupiers of any premises to remove themselves and their possessions so that vacant possession might be taken for the purpose of defence works, the Secretary of State for War would procure that, when necessary, immediate financial assistance would be forthcoming, either from a military officer on the spot, or through the local authority, for the purpose of enabling such persons to move themselves and their property, or that adequate transport facilities should be otherwise provided. He asked further whether, where it was necessary in any area to take possession for military defence purposes of part only of a house occupied by residents, some immediate payment would be made, or weekly rent paid, either through a military officer on the spot, or the local authority, in respect of the part so taken, particularly in those cases where part of the family or their possessions had been moved and housed elsewhere. Mr. EDEN recalled that the compensation payable where, under the Defence Regulations, possession was taken of a property, in whole or in part, was prescribed in the Compensation (Defence) Act, 1939. That covered reasonable removal expenses. Claims had to be rendered in a prescribed form and manner and the amount payable had to be assessed and agreed with the claimants. But in cases of need, payments on account could be made. Mr. EDEN said that the Land Staff in Command, who were responsible for that work, had already been increased and he was taking steps to increase them further.

Recent Decisions.

IN *Grey* v. *Gee Cars, Ltd.* (*The Times*, 27th July), HUMPHREYS, J., held that the defendants were not liable to the plaintiff, either on grounds of negligence or breach of contract, for the value of her luggage which had been loaded on to a car hired by her from them and had been lost owing to the fact that their chauffeur drove away while the plaintiff was taking shelter on the sounding of an air-raid warning just as she was about to begin the journey.

Criminal Law and Practice.

Power to Detain Suspected Persons.

Now more than ever any elucidation of the law relating to the liberty of the subject is of vital importance. In its broader aspect, the recent decision of the Court of Appeal in *Gorman* v. *Barnard and Another* (1940), 56 T.L.R. 929, raises this issue, although the narrow question which it actually decided was the meaning of the word "offender" in s. 186 of the Customs Consolidation Act, 1876.

The short facts were that the plaintiff, a ship's steward on a ship bound from Burma to Liverpool, bought a box of cigars in Rangoon. At 6 a.m. on 4th July, 1938, the defendants, who were preventive Customs officers, came on board the ship and presented the usual Customs List No. 142, which was signed by the plaintiff and R, an apprentice. Neither the plaintiff nor R declared the cigars, either in this form or by word of mouth. The plaintiff kept the cigars lying on a spare bunk in the cabin where he slept till between 10 a.m. and 11 a.m. on 4th July. Later they were found by the defendants under the mattress in a bunk in an occupied state room on the ship. R told one of the defendants that he had agreed to buy the cigars from the plaintiff for 5s., and that at about 10.30 a.m. on 4th July he received them from the plaintiff and hid them under the mattress, where they were found.

On 5th July the defendants detained the plaintiff and took him to the police court, where he was charged with knowingly harbouring uncustomed goods, consisting of a box of cigars, with intent to defraud His Majesty of the duties thereon, contrary to s. 186 of the Customs Consolidation Act, 1876. He was released on bail on the same day after having been detained in custody for some hours. The charge was dismissed by a stipendiary magistrate two days later, and on 15th December, 1938, the plaintiff commenced the present action, claiming damages for malicious prosecution and false imprisonment. The defence was that the defendants had reasonable and probable grounds for belief in the plaintiff's guilt.

The trial judge had regard to the demeanour of the witness as well as generally to the facts of the case and found that the defendants had reasonable and probable ground for disbelieving the plaintiff. He therefore gave judgment for the defendants. The Court of Appeal accepted his finding of fact, but allowed the appeal of the plaintiff (MacKinnon, L.J., dissenting) on a point of law.

This point turned on the meaning of the word "offender" in s. 186 of the Customs Consolidation Act, 1876. The section, *inter alia*, made it an offence knowingly to harbour or conceal uncustomed goods, and concludes: "and the offender may either be detained or proceeded against by summons." If "offender" meant, as was contended for the Crown, "a person suspected of offending" the defendants had every right to detain the plaintiff, and he had no cause of action. If not, then the plaintiff succeeded.

Had it not been for other arguments on behalf of the Crown with which it was necessary to deal, Scott, L.J., intimated that he would have been content to limit his judgment to the simple ground that the word "offender" must be construed on a comparable footing with the word "offence" in the previous sentence, where it was provided that "for each such offence" the person in question should forfeit either treble the value of the goods, including duty, or £100, at the election of the Commissioners of Customs. "Offence" must mean "offence actually committed" and "offender" must mean person who actually committed an offence.

On an examination of other sections of the 1876 Act (ss. 199, 169 to 217, 202, 203, 205 and 267), the learned Lord Justice stated that his view was confirmed as to the meaning of the word "offender," and that this was not negatived by the argument that the noun "offender" when followed by the words "may . . . be . . . proceeded against by summons" must be construed as meaning the person to be charged with the offence in the summons.

If there was still any doubt, his lordship said, the long list of statutes authorising arrest cited in "Halsbury's Laws of England" (2nd ed.), vol. IX, pp. 89 to 94, deserved attention. There were two main categories: (1) those which conferred a power of arrest where the offence was in fact committed, the offence generally being one which is actually witnessed by the person authorised to arrest, or is otherwise patent; (2) those where the power is expressly given on reasonable suspicion, e.g., Larceny Act, 1861, s. 116; Army Act, s. 154. There was a third type, where the court implied the power of arrest in cases of suspicion from the nature and object of the statute, namely, that it contemplated immediate need of an arrest to prevent injury to the public. His lordship discussed a number of cases on this point—*Trebeck* v. *Croudace* [1918] 1 K.B. 158; *Isaacs* v. *Keech* [1925] 2 K.B. 354; and *Ledwith* v. *Roberts* [1937] 1 K.B. 232—and held that the principle had no application whatever to the enforcement on behalf of the Commissioners of Customs of a customs fine.

As has been indicated, MacKinnon, L.J., took a contrary view as to the meaning of the word, particularly having regard to ss. 197, 221 and 229 and s. 10 of 11 & 12 Vict., c. 42. He also pointed out that the word "culprit," which is at least as suggestive of guilt as the word "offender," was for centuries used by the clerk of assize in addressing a person charged with an offence before his trial.

The principle in *Bowditch* v. *Balchin*, 5 Ex. 378, at p. 381, was approved by Clauson, L.J. There the plain words of a statute (s. 18 of 2 & 3 Vict. c. 94) empowered an officer of the City of London police to take into custody without warrant all loose, idle and disorderly persons whom he should find disturbing the public peace or whom he should have good cause to suspect of having committed or intending to commit any felony, misdemeanour or breach of the peace. To an action for damages for assault and false imprisonment it was pleaded that the defendant had reasonable cause for suspecting that the plaintiff had committed perjury, but there was no averment that the plaintiff was a loose and disorderly person. Judgment was given for the plaintiff, Pollock, C.B., saying: "How can we go beyond the grammatical construction to restrain the liberty of the subject?"

In *Trebeck* v. *Croudace* [1918] 1 K.B. 158, which Scott, L.J., hinted was not easy to reconcile with *Bowditch* v. *Balchin*, it was held that the power under s. 12 of the Licensing Act, 1872, to apprehend a person who was "drunk while in charge on any highway . . . of any carriage" applied to cases of reasonable suspicion. This was because of the nature and object of the statute which contemplated an immediate need of arrest to prevent injury to the public. Clauson, L.J.'s comment on this case was that it was authority for the following proposition, namely, that the natural construction of a section conferring a power of arrest on an executive officer in case of the commission of an offence is that it confers a power of arrest in the case of an honest belief on reasonable grounds that the offence has been committed, if the character of the offence is such that, in the interests of public safety, or on account of threatened danger to life, limb or property, prompt action is called for."

On the authority of this case a similar decision was reached by the Court of Appeal in *Isaacs* v. *Keech* [1925] 2 K.B. 354, in which it was held that s. 28 of the Town Police Clauses Act, 1847, which empowered a constable to take into custody, *inter alia*, "every common prostitute or night-walker loitering and importuning passengers for the purpose of prostitution," only did so where the constable reasonably suspected the commission of an offence. Bankes, L.J., said in that case that he thought that the whole trend of authority had been to put a uniform construction upon enactments giving power to arrest without a warrant a person found committing an offence, and to hold that what the Legislature had in mind was not a mere power to arrest the person ultimately found guilty of the offence, but was a power to be exercised by the proper authority of acting at once on an honest and reasonable belief that the person was committing the particular offence. This was approved by MacKinnon, L.J., in his dissenting judgment in *Gorman* v. *Barnard*, *supra*.

In *Ledwith* v. *Roberts* [1937] 1 K.B. 232, it was held that the powers of a constable under the Vagrancy Act, 1924, of arresting without a warrant every suspected person or reputed thief frequenting any street or highway or place adjacent thereto with intent to commit a felony, only applied to persons who came within the description of "suspected persons" or "reputed thieves." Greer, L.J., said: "I think it follows from the decisions that once it is established that the person arrested belonged to the class of persons with respect to whom the special power to arrest is given to the constables, then if the constable honestly and on reasonable grounds believes that the person apprehended has been committing or attempting to commit a felony or misdemeanour he has power to arrest even though it should be established later that the person arrested was not, in fact, attempting to commit a felony or misdemeanour." Greene, L.J., did not go as far as this, but thought it necessary to go back to the words of Pollock, C.B., in *Bowditch* v. *Balchin*, *supra*. He also doubted the validity of the decision in *Trebeck* v. *Croudace*, *supra*. Scott, L.J., adopted this part of the judgment of Greene, L.J., as part of his judgment in *Ledwith* v. *Roberts*, *supra*.

The weight of authority is clearly against a power of the proper authority to arrest on reasonable suspicion being read into all statutes of this type. Where it can be inferred from the express words and grammar of the statute, there can be no dispute about it; if, however, it is not clear from the express language of the statutory power, it will only be inferred where it is necessary to give immediate power of detention to the public official in question in the interests of the safety of the public or the protection of property.

Remedies Against Enemy Property in this Country.

THE working of the Courts (Emergency Powers) Act, 1939, has disclosed a hardship which can scarcely have been intended by the Legislature, and which seems to call for some amendment of the law.

Under s. 1 (2) a person is not entitled, except with the leave of the appropriate court, to proceed to exercise any remedy which is available to him by way of the levying of distress, the taking possession of property, etc. On the application for leave of the appropriate court, if such court is of the opinion that the person liable is unable immediately to satisfy his obligation by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged, the court may refuse leave, or give leave subject to such restrictions and conditions as it thinks proper.

Taking as an example the particular case of distress, the appropriate court, it will be remembered, is the High Court in any case, or the county court as an alternative where the amount for which distress is sought to be levied does not exceed £100. In the latter case the application is not to be made to the High Court except in special circumstances (Courts (Emergency Powers) Rules, 1939, r. 4 (1) (*a*) and (3)).

The application for leave to distrain is by originating summons in the High Court (Courts (Emergency Powers) Rules, 1939, r. 15) and originating application in the county court (County Court (Emergency Powers) Rules, 1939, r. 16 (1)).

The difficulty has arisen with regard to alien enemies who are tenants of premises in this country but who have managed to return to their own countries before the outbreak of war. Where an originating summons is issued out of the High Court, the respondent is not required to enter an appearance, and Ord. 54, r. 4E, applies. This provides that it must be served two clear days before the return unless otherwise ordered in any case. In the county court, Ord. VIII applies to the service of the notice, subject to certain modifications set out in r. 16 (3) of the County Court (Emergency Powers) Rules, 1939. In courts of summary jurisdiction the notice must be served in the manner in which a summons for non-payment of rates is served not less than two clear days before the hearing of the summons. The service of the notice is obviously vital to the procedure, and r. 16A of the Courts (Emergency Powers) Rules, 1939, which deals with service, states expressly that no warrant of distress for rates shall issue unless the court is satisfied that a notice has been served in accordance with the rules.

Service out of the jurisdiction of an originating summons in the High Court may be allowed by the court or judge under Ord. XI, r. 8A (*b*). Order XI, r. 11, prescribes a certain procedure for service out of the jurisdiction in France or in any other foreign country with which a Convention in that behalf has been or shall be made, subject to any special provisions in the Convention. Conventions have been signed with Germany (1929), Belgium (1924), Norway (1931), Austria (1932), Poland (1932), Italy (1932) and Denmark (1933).

The normal procedure so far as is relevant to the present question is for the party bespeaking the service to file a prescribed form of request in the Central Office, stating the medium through which it is desired that the service should be effected, i.e., whether directly through the British Consul or through the foreign judicial authority. The documents, having been properly sealed, are forwarded by the Senior Master to the Under-Secretary of State for Foreign Affairs for transmission to the foreign country. An official certificate, transmitted through the diplomatic channel by the foreign judicial authority, or by a British consular authority, to the English court, establishing the fact and the date of the service of the document, is deemed to be sufficient proof of such service, and is filed of record as and is equivalent to an affidavit of service. Under the Convention with France process is served by a huissier appointed by the Procureur de la Republique, and any difficulties which may arise in respect of the request may be settled through the diplomatic channel.

The practice has been established of accepting the certificate of a neutral diplomatic authority that service has been effected in countries at war with His Majesty. Generally speaking, it is correct to effect service in a convention country through the British consul or through the foreign judicial authority except where the convention otherwise provides. If the treaty corresponds with that with Germany in 1929, the document may be served without the intervention of the competent authority of the country in which service is to be effected, (*a*) by a diplomatic or consular officer of the contracting party from whose territory the document emanates; or (*b*) by an agent appointed, either generally or in any particular case, by a tribunal of the country from which the document emanates or by the party on whose application the document was issued. If, therefore, the neutral diplomatic authority has been properly appointed, the method adopted for proof of service appears to be correct, if the convention is valid in war-time.

There is, however, one difficulty which may be raised at some future date in order to support a contention that no service has in fact been effected. That is that treaties and conventions between two states are sometimes said to be automatically cancelled by war between the parties. Whether this applies to all treaties, whatever their nature, seems to be a matter of some doubt. In "Wheaton on International Law" (6th English edition, vol. 1, pp. 516, 517), it is stated that cancellation occurs generally in case of war between the contracting parties unless stipulations were made expressly with a view to rupture between the parties; such as where a period of time is allowed to their respective subjects to retire with their effects in case of war, or treaties for the regulation of the conduct of war. "Non-political treaties," this authority continues, "are said not to fall automatically, but that is quite implausible . . . economic and technical treaties are expressly renewed, sometimes with modifications, while others not referred to are still accepted as valid, on one view. In point of fact, however, the peace treaties seem to be exhaustive." If, in fact, conventions such as that of 1929 with Germany fall in case of war, there would appear to be no answer to the contention that service cannot be proved by producing the certificate of a diplomatic authority who has effected service in time of war.

One cannot help observing the academic nature of the requirement of the Courts (Emergency Powers) Rules that service should be effected in cases where it is obviously impossible for the person served to fulfil the object of the service, that is, to attend at the court and explain the reasons why he is unable immediately to pay by reason of circumstances directly or indirectly attributable to the war. The mere fact that such a person is an enemy alien resident in enemy territory should be sufficient to satisfy any court of immediate liability to pay. Rule 8 (2) of the Courts (Emergency Powers) Rules, 1939, and r. 8 (3) of the County Courts (Emergency Powers) Rules, 1939, provide that the court may make any order it thinks proper even where the person served fails to put in an appearance, and at first sight it would seem that it would be proper in all these cases for the court to refuse leave to proceed. The obvious objection to this is that it extends the protection of the Act from those who are financially embarrassed as a result of the war to those to whom the war has come as an opportunity of avoiding payment of their debts on technical grounds.

Finally, it may be said that a way out of the difficulty is to be found in paragraph 2 of the Custodian Order, 1939, by applying to the Board of Trade for an order vesting the property or the right to transfer it in the Custodian of Enemy Property. It should be observed, however, that para. 3 (ii) of the same Order gives the Board of Trade power to make a general or special direction empowering the Custodian to transfer any particular property in respect of which a vesting order has been made to or for the benefit of the person who would have been entitled thereto but for the operation of the Act or any Order made thereunder, or to any person appearing to the Custodian to be authorised by such person to receive the same. It is difficult to see how a landlord distraining for rent can be "entitled" to the objects of his distress until he has made a successful application to the court under s. 1 (2) (*a*) (i) of the Courts (Emergency Powers) Act, 1939, and as has been seen, there are certain difficulties in the way of this application in cases such as those dealt with in this article. In view of the number of cases to which these observations may apply, it is submitted that additional rules might be made under the Courts (Emergency Powers) Act, 1939, to deal with the matter. Even if this is done, application to the Board of Trade for a vesting order under para. 2 of the Custodian Order will be advisable to safeguard against a possible charge of trading with the enemy contrary to s. 1 (2) (*a*) of the Trading with the Enemy Act, 1939, which prohibits (*inter alia*) commercial, financial or other dealings with an enemy.

The News-sheet of the Bribery and Secret Commissions Prevention League for June–July gives the following number of convictions for bribery to date: Under the Prevention of Corruption Acts, 1906–16: England, 752; Scotland, 62; Wales, 46; Eire, 22; Northern Ireland, 12; under a dozen other Acts since January, 1907, at least 115, making a total of 1,009. Under the Prevention of Corruption Acts, police cases numbered 430, official cases 295, private 172, persons sent to prison 221. Fines and costs, where stated, amounted to £32,518 9s. 6d.

A Conveyancer's Diary.

Rectification of Settlements.

By a marriage settlement of 1863 there was conveyed to certain trustees all the property, present and future, of the wife " to hold the same unto the said trustees, their executors administrators and assigns," upon trust for the wife, " her executors administrators and assigns," until the marriage, and subject thereto upon trust for the wife for life, with remainder to the husband for life and with various remainders for children, which never came into operation, because there were no children. In default of issue the property was to be held on trust for the wife, if she should be the survivor, " her executors administrators and assigns," or for the husband, " his executors administrators and assigns," in the event of the wife predeceasing him. The wife died a month or two after the marriage, and so, of course, there was no issue. The estate of the wife later became entitled to a fund in court, representing real estate, and this fund was caught by the settlement. The husband then presented a petition praying that it might be declared that he was entitled thereto in fee simple, and if necessary, for rectification of the settlement by the insertion of the word " heirs " therein immediately before " executors administrators and assigns " wherever those words occurred. The case (*Re Bird*, 3 Ch. D. 214) came before Malins, V.-C., in 1876, the only evidence being affidavits of the husband and of the wife's brother-in-law, showing the intention of the parties that the estates conferred by the gift to persons, " their executors administrators and assigns," were intended to be estates in fee simple, a result which would follow from the insertion of the word " heirs." The Vice-Chancellor decided that the clear intention was to convey or create in each case an estate in fee simple, and therefore decreed rectification. He did not seem to think it worth while discussing the possibility that the instrument as it stood, without reformation, could be construed to create estates in fee simple. On the later cases it seems that he might have done so as regards the equitable estates ; but the primary grant was one of the legal estate to the trustees, and it could hardly have been possible in those days (or since) to construe words of limitation of a legal estate anything but strictly. On the other hand, he seems to have had no doubt that the case was one for rectification, as he only discussed the question whether there was jurisdiction to rectify on a petition for payment out.

In *Re Whiston* [1894] 1 Ch. 661, there was a settlement of an equity of redemption in freeholds upon trust for the husband and wife for their respective lives, with the usual trusts for children, but omitting the words of limitation necessary to confer the equitable fee on the children. Chitty, J., held that at that date the rules as to words of limitation in the case of equitable estates, even if the trust was not executed but executory, were as strict as those for legal estates, so that the children took mere life interests. He came to this decision notwithstanding the presence of a power of advancement, a provision hard to reconcile with the possession by the beneficiary of it of a mere life interest.

Ten years later an exactly similar set of circumstances (save for the absence of a power of advancement) arose in *Re Tringham* [1904] 2 Ch. 487. Here Joyce, J., criticised the earlier decision of Chitty, J., and felt able to hold, upon the true construction of the instrument, that the children took an equitable fee simple, on the ground that, since the estates were equitable, the intention overrode the necessity for strict words of limitation. This decision was followed five months later by Farwell, J., in *Re Oliver* [1905] 1 Ch. 191, where the learned judge contented himself with citing *Re Tringham* with approval. In neither of those cases was there any necessity for the court to consider rectification, since the desired result was capable of achievement by a mere exercise of the court's power to construe the deed as it stood. But in *Re Tringham*, Joyce, J., added at the conclusion of his judgment that, had he come to a different conclusion on construction, " I should have had most seriously to consider whether I ought not to rectify the declaration of trust . . . by the insertion of the word ' heirs ' where it is supposed to be required." There is nothing in the report to indicate whether there was any evidence of the actual intention of the parties to the settlement, so one must presume there was none. It is therefore open to suppose that Joyce, J., would have required the production of some such evidence : indeed, he referred to *Re Bird*, where there was evidence.

All those cases concerned equitable limitations, save in respect of the estate of the trustees in *Re Bird*. In *Re Bostock* [1921] 2 Ch. 469, the Court of Appeal had to deal with a case where the estate had been conveyed to trustees to the use of the husband and wife for successive life interests, and subject thereto in trust for the children, omitting the words of limitation necessary to give them the fee simple. There was a power of advancement in favour of children. Here the court took the view that the trust was executed and perfected, and that in such conditions strict words were necessary for the creation of an estate in fee simple. The court adopted this view with expressed repugnance, Younger, L.J., saying that the deed " embodies from first to last no other intention than that the children of the settlor . . . are to take an absolute interest . . . in the freeholds " (at p. 487), and that " the omission from the limitation of the freeholds to the children of the words adapted indubitably to produce that result is an omission of the draftsman attributable either to accident or to ignorance." The summons did not ask for rectification, and there is no trace in the report of any evidence of intention filed to support such a claim, but Younger, L.J., went out of his way both to state what the intention was, and to say that he found no basis for reforming or rectifying the instrument in a case where the trust was perfected. The Court of Appeal, in fact, declined to follow *Re Tringham* and *Re Oliver*, and reverted to *Re Whiston*.

Now the tendency to strictness has been again reversed by Morton, J., in *Banks* v. *Ripley*. The case has not yet found its way into the Law Reports, and we have therefore to rely on the report in [1940] W.N. 201. Here the property was conveyed in 1873 in consideration of marriage to the use of the wife's father till the marriage and thereafter to the use of the trustees upon all the usual trusts, but omitting, in the case of the trust for children, the words of limitation adapted to convey or create a fee simple. The report states that upon the death of the wife in 1901, the only child of the marriage, Annie Banks, became entitled in possession to the settled land, but her solicitors " subsequently discovered " that " on the true construction " of the settlement Annie Banks took only a life interest. In 1939 she began proceedings for rectification by inserting the words of limitation necessary to give her a fee simple. No evidence of intention was tendered apart from the settlement itself. Relying on an eighteenth century case and two Irish cases of the early twentieth century, Morton, J., held that no other evidence need be given, and decreed rectification. According to the report he also cited *Re Whiston*, *Re Tringham*, *Re Oliver* and *Re Bostock* (none of which dealt directly with rectification), but not *Re Bird* (which did). If this account of the cases cited be accurate, it seems probable that the learned judge will be found in the full report to have indicated that if he had been asked to do so he would have declared that, *on construction*, the plaintiff took a fee smple, and that he only granted rectification by reason of that being the relief prayed. In any event it seems desirable in such cases to ask for a declaration and for rectification in default of that primary remedy.

Landlord and Tenant Notebook.

Furnished Lettings and Emergency Legislation.

The common law gives special attention to furnished lettings, excepting agreements and leases from the general rule by which landlords are under no implied obligation to warrant fitness. Occasionally judges have wondered why, and speculative *dicta* have been pronounced, but they are not even unanimous. Statute law has in general had no occasion to discriminate between premises let furnished and premises let unfurnished ; but some of the recent emergency measures show themselves alive to the distinction when they do not actually draw it.

The Rent, etc., Restrictions Acts have always been conscious of the distinction. A proviso in the interpretation clause of the 1915 Act excluded " premises let at a rent which includes payments in respect of board, attendance, or use of furniture," which the 1920 Act qualified by " save as otherwise expressly provided," this being an allusion to the anti-profiteering provision introduced by s. 6 of the 1919 Act and reproduced in s. 9 of that of 1920. The latter went on, in s. 10, to make extortionate rent for furnished lettings a serious criminal offence. These provisions did not, however, confer the same security of tenure as was created by the main part of the legislation ; hence the appearance on the market of a commodity known as " Rent Act lino," which, the blessing of the courts having been half-heartedly bestowed in such decisions as *Wilkes* v. *Goodwin* [1923] 2 K.B. 86 (C.A.), continued in most cases to serve one of its purposes, though worn out, till dealt with by s. 10 (1) of the 1923 Act.

But a question which has been mooted in consequence of a more recent emergency is this : does the Landlord and Tenant (War Damage) Act, 1939, affect furnished lettings, and if so, how ? Reading the enactment, it is difficult to say that those who framed it either thought or did not think about this matter. There is indeed no direct reference to furniture or premises let furnished ; on the other hand, the subject of

many sections is " land comprised in a lease " or " damage to land comprised in a lease "—not the lease itself, so there is room for the possibility that the omission to deal with anything else that might be comprised in a lease was deliberate.

Be this as it may, the question is, in view of the provisions of the Liability for War Damage (Miscellaneous Provisions) Act, 1939, passed six days later, and of the fact that in those six days no war damage was done, virtually an academic one. For this enactment exonerates bailees from liability for loss and damage to goods, from liability to repair, replace, restore, deliver up, pay for hire or pay compensation or damages for the loss or damage in so far as it is liability for loss or damage by war. The definitions of " war damage " in Landlord and Tenant (War Damage) Act and of " loss by war " and " damage by war " in the Liability for War Damage (Miscellaneous Provisions) Act correspond ; both apply to agreements made before or after they were passed, and the latter is made to cover implied obligations. Hence, if they are not substantially complementary as regards furnished lettings, this is merely because and in so far as they overlap. There is, however, one point on which they do not agree ; s. 21 of the Landlord and Tenant (War Damage) Act tersely prohibits contracting out ; s. 1 (3) of the Liability for War Damage (Miscellaneous Provisions) Act excludes from the scope of the main provision " any liability imposed by any contract if the liability is expressly related to war by the terms of the contract."

Examining the position apart from the effect of the later statute, I think the conclusion would be that the modification of obligations to repair imported by Landlord and Tenant (War Damage) Act would not in themselves exonerate a tenant from liability in respect of furniture, but that if the conditions entitling him to disclaim were satisfied and he disclaimed the lease the landlord would (apart from the other enactment) have no right of action in respect of any damage to the furniture.

The reasoning is as follows : Pt. I, which deals with modification of obligations to repair by excluding liability for war damage, describes those obligations as obligations to do any repairs *to the land*, and the war damage as war damage occurring *to the land*. On the authority of *Phillimore* v. *Lane* (1925), 133 L.T. 268, it seems safe to say that at common law an ordinary covenant relating to furniture in a lease of furnished premises would render the tenant liable for war damage ; hence in such a case he would have to rely on the Liability for War Damage (Miscellaneous Provisions) Act, as he could, provided the lease did not expressly make him liable for war damage. Part II confers a right of disclaimer when the land comprised in a lease is unfit by reason of war damage. " Land " includes " any buildings or works situated on, over or under land," but not chattels ; so even if all the furniture in a house let furnished were destroyed by a fire caused by an incendiary bomb the tenant could not, provided the house were still fit, disclaim the tenancy. But if he has that right " the lease disclaimed shall be deemed to have been surrendered," says s. 8 (2) (*b*)—a description which seems to have been borrowed from repealed Bankruptcy Acts (and, I think, deliberately omitted from s. 54 of the present Act of 1914, and from s. 267 of the Companies Act, as being inconsistent with the newly-introduced right of the court to deal with fixtures). Now it may be that no one has ever heard of surrendering a bailment, but it can be pointed out that tenancies are not the only contracts which trustees in bankruptcy and liquidators may disclaim ; consequently there is nothing startling about a rule of law which would enable a tenant, when surrendering *in invitum* a lease of furnished premises, to terminate both his interest in and his liability for the furniture, as for the house. " He is not to remain liable to engagements attaching to property when that property is taken away from him," said Jessel, M.R., expounding the nature of bankruptcy provisions in *Ex parte Walton, re Levy* (1881), 17 Ch. D. 746 (C.A.) ; and the argument that the object of the Landlord and Tenant (War Damage) Act, Pt. II, is essentially the same is not too far-fetched. And " a surrender of the lease must be a surrender of the whole lease . . . of every provision in it, whether beneficial to the tenant or onerous," said the same judge in *Ex parte Glegg, re Latham* (1881), 19 Ch. D. 7 (C.A.).

In the case of the Defence (Evacuated Areas) Regulations moratoriums (discussed in last week's " Notebook "), the rent of furnished premises, even if not completely within provisions suspending liability for " rent," would be covered by the words of reg. 4 (1) (*a*), " no sum payable periodically in respect of any right enjoyed in connection with such premises " or else of (*b*) " no sum shall be recoverable . . . for the hiring . . . of goods."

Our County Court Letter.

Damage from Frozen Water Pipes.

In a recent case at Ilford County Court (*Buck* v. *Leach*) the claim was for £10 17s. 6d., as damages, for breach of a tenancy agreement. The plaintiff had let a dwelling-house to the defendant on the 1st July, 1938, on condition, *inter alia*, that the defendant should keep the interior of the premises and the water apparatus in good and tenantable repair and condition (fair wear and tear excepted), and would yield up the premises in good and tenantable repair, except as aforesaid. The tenancy was terminated by mutual consent on the 20th January, 1940, when it transpired that the " Ideal " boiler was cracked, water pipes had burst, the water in the hot water tank was frozen, and the cold water storage cistern had a hole in it. The plaintiff's case was that the defendant was liable for the above amount, as the cost of the repairs. Liability was denied, on the grounds that the damage was due to fair wear and tear, or, alternatively, to an Act of God. The defendant's case was that the exceptionally hard frosts in January were so abnormal that they were beyond what was in the reasonable anticipation of the parties on making the agreement. If the defendant had run off the water, and so kept it circulating in the pipes, the water authority would have complained of waste. His Honour Judge Trevor Hunter, K.C., observed that, even if the severe frost were an Act of God, this would be no defence, The action was not for waste, but for breach of contract. In *Paradine* v. *Lane* (Alleyn 26, 27) it was held that, in the case of waste, if a house is destroyed by tempest, the lessee is excused. But where a party by his own contract creates a duty upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it. This decision was followed in *Redmond* v. *Dainton* [1920] 2 K.B. 256, in which it was held that the lessee was liable to repair damage caused by a bomb from an enemy aeroplane. The severe frost, however, did not constitute an Act of God within the definition in *Newton* v. *Smith* (1876), 1 C.P.D. 441, and *Siordet* v. *Hall* (1828), 1 Moore & Payne 561. The question of what constituted fair wear and tear was considered in *Taylor* v. *Webb* [1937] 2 K.B. 283. It was laid down at p. 296 that the phrase only extended to the normal action of the elements, viz., what the parties would reasonably anticipate. At p. 302 the phrase was stated to apply to disrepair brought about by normal or ordinary operation of natural causes, e.g., wind and weather, as opposed to abnormal or extraordinary events, such as lightning, hurricane, flood or earthquake. The defendant's own description of the weather conditions showed that they were far beyond normal, or what could have been in the reasonable anticipation of the parties when entering into the tenancy agreement. The defence accordingly failed also on the plea of " fair wear and tear," and judgment was given for the plaintiff for the amount claimed, with costs. Compare *Fearon* v. *Gomez* (1939), 6 L.J.C.C.R. 362 ; *Tilley* v. *Stevenson* (1939), 83 Sol. J. 943—a claim in tort against an adjoining owner—and *Watson* v. *Sutton District Water Company* (1940), 104 J.P. & L.G.R. 416.

Liability for Damage by Ram.

In a recent case at Ludlow County Court (*Pearce* v. *Sealon*) the claim was for £5 5s. as damages for the loss of a ram. The plaintiff's case was that on the 6th December he had found his ram dead in an 18-acre field. It had blood on its head, and marks were traced to where two rams appeared to have been fighting, and thence to neighbouring land. The defendant's ram was there found, and it had blood on its head and also some wool missing. The defendant's case was that his ram had nothing wrong with it at the date alleged. Although he had often met the plaintiff subsequently, no allegation was made as to the defendant's ram having caused the damage—until a solicitor's letter arrived. A neighbour, who had impounded the ram of the defendant, had seen no blood on its head, although some wool was missing. His Honour Judge Samuel, K.C., was not satisfied that the damage was done by the ram of the defendant. Judgment was given for the defendant, with costs. It is to be noted that a ram is presumed not to be dangerous ; and it is necessary to prove *scienter*, or knowledge by the owner of any mischievous propensity, in order to recover damages for any injury caused by a ram (see *Jackson* v. *Smithson* (1846), 15 M. & W. 563). That was a case of an attack on a human being, in which the plaintiff obtained judgment for £10, on proof of *scienter*. It is in the nature of rams to fight other rams, and the mere fact of one of them being killed does not entitle its owner to recover damages. This would be tantamount to imposing a penalty on the owner of any animal victorious in combat with another animal of the same breed, age, size, etc.

To-day and Yesterday.

Legal Calendar.

29 July.—Sir James Wigram died on the 29th July, 1866, sixteen years after his resignation from the office of Vice-Chancellor had been forced upon him by ill-health resulting in total loss of sight, an affliction which he bore with serene patience during the remainder of his life. He was appointed a judge in 1841, only four months after becoming Member of Parliament for Leominster, but his promotion was due to his eminence at the equity Bar and not to any political considerations.

30 July.—Deep mystery surrounds the trial of Archibald Bolam at the Newcastle Assizes on the 30th July, 1840, for the murder of Joseph Millie. The accused had been for sixteen years actuary to a savings bank and bore an excellent character. The deceased was a clerk whom he had befriended and whose employment he had procured. The facts were that one night towards the end of the year they had stayed late at the office to make up the accounts. Nothing unusual was noticed till between 1 and 2 o'clock the place was seen to be on fire. The firemen arrived before the premises were consumed. Bolam was found injured, Millie dead, evidently as the result of a heavy blow. Bolam's story included the receipt of a threatening letter. He said he had left the bank for a while, returned to find Millie dead, and then been set upon by a stranger who had got into the room. The jury, rejecting verdicts of murder or acquittal, found Bolam guilty of manslaughter on the footing that he had killed Millie in a sudden affray and then tried to cover up his actions.

31 July.—On the 31st July, 1908, the House of Lords decided the case of *Greenshields, Cowie & Co.* v. *Stephens & Sons, Ltd.* [1908] A.C. 431. It is the first instance of a judgment delivered by telegraph, for when the other lords had spoken the Earl of Halsbury said: "My lords, I have a telegram from my noble and learned friend, Lord James of Hereford, intimating that he concurs in the judgment."

1 August.—Sir William Grove, formerly a judge, died after a slow decline at his home at 115, Harley Street, London, on the 1st August, 1896.

2 August.—On the 2nd August, 1839, Henry Vincent, the Demosthenes of the Chartist movement, was tried at the Monmouth Assizes on a charge of attending a riotous assemblage at Newport. Though witnesses for the prosecution had admitted that he had told the people to disperse quietly and keep the peace, he was convicted and sentenced to a year's imprisonment. The charge against him had so roused popular feeling that when he had been committed for trial a tumult outside the court had obliged the Mayor of Newport to read the Riot Act. The result of his condemnation was that three months later thousands of miners rose and attacked the town, coming into collision with the military.

3 August.—On the 3rd August, 1662, Pepys recorded: "Pitt told me how despicable a thing it is to be a hangman in Poland although it be a place of credit. And that in his time there were some repairs to be made of the gallows there, which was very fine of stone; but nobody could be got to mend it till the Burgomaster or Mayor of the town with all the companies of those trades which were necessary to be used about those repairs did go in their habits with flags in solemn procession to the place and there the Burgomaster did give the first blow with the hammer upon the wooden work and the rest of the Masters of the Companies upon the works belonging to their trades that no workmen might be ashamed to be employed upon doing the gallows' works."

4 August.—On the 4th August, 1735, Henry Rogers and his servant John Street were hanged, having been condemned to death at Launceston for killing two men while opposing the Sheriff of Cornwall in the execution of his office. Rogers, who before his death would take only bread and water, said that had it been in his power he would have killed as many more and thought it no crime. Street said that he had only defended his master and was willing to die, as in the course of years he could not live much longer.

THE WEEK'S PERSONALITY.

Sir William Grove attained the unusual distinction of eminence both as a man of science and as a judge. By one of those odd twists of fortune which make the study of human beings so interesting and so unaccountable, it was through a spell of ill-health retarding his career at the Bar that he gained the leisure to follow his natural taste for scientific investigation. In 1835, the year of his call, he became a member of the Royal Institution, and nine years later he was elected vice-president. In 1839, his invention of the Grove battery brought him into prominence and in the following year he was elected F.R.S. and appointed to the chair of experimental philosphy in the London Institution. Grove's scientific eminence reacted on his legal career. Briefs in patent cases came to him and improved health enabled him to pursue his work as an advocate with energy. In 1864 he was a member of the royal commission appointed to inquire into the law of patents, and in the same year he became a Justice of the Common Pleas. He retired from the Bench in 1887. Though he was an efficient judge, the fact that he was not specially assigned to the hearing of patent cases prevented him from rendering the highest service of which he would have been capable.

NOT CONTENT.

The eighty year old justice of the peace who was recently fined £2 in his own court at Bedford adopted an attitude as defiant as Mr. Pickwick's over the breach of promise damages, declaring that he would rather go to prison than pay a penny. He recalls the judge in Scotland who, when he lost an action before his brethren, called them "superannuated jackasses," and for the rest of his judicial career refused to sit anywhere near them in court.

When those who administer justice are dissatisfied with the results of their own experience the layman may well be disconcerted, but even without a personal cause for bitterness some men of law seem to take an inordinately gloomy view of the subject: "Take my advice, my good friend," one Irish judge is reported to have said to a farmer who was toying with the idea of an action; "suffer any inconvenience rather than go to law, as the chances are more against you than in any lottery." Accordingly, it was reassuring recently to see a lady barrister (and one prosperous enough to have a flat in Park Lane) coming to the Chancery Division for an injunction against a mammoth firm of contractors to restrain them from committing a nuisance by noise in the neighbourhood of the said flat. The order she obtained substantially limited the hours of permitted pandemonium, yet, had she listened to cautious colleagues, she might never have tried her luck. Even so, the mother of Lord Blackburn rejoiced when she ignored her learned son's advice and took a tradesman with whom she had quarrelled to the county court. It is said that she plainly told her son that she did not think much of his law and was surprised at his great reputation.

EARLY RISING.

In the course of the hearing of the case against the contractors, counsel for the defendants referring to a complaint of noise at 10 a.m., observed that "not many barristers are resting at ten in the morning." That is probably true (though "midnight oil" is more popular at the Bar) but it is not universal. Sir Edward Clarke may sometimes have overslept, for once when invited to a consultation at 9.30 a.m. by Sir Richard Webster, he replied: "I will do anything in the world for you, but I will not get up in the middle of the night." Webster rose at 6 a.m.

Obituary.

MR. J. F. FALWASSER.

Mr. John Frederick Falwasser, solicitor, of Messrs. Dibb and Clegg, solicitors, Barnsley, died on Sunday, 14th July, at the age of seventy. Mr. Falwasser was admitted a solicitor in 1894 and until 1938 was Chairman of the Barnsley Court of Referees.

Books Received.

Tolley's Complete Income Tax, Sur-tax, etc., Chart Manual of Rates, Allowances and Abatements for 1940–41. Price 4s. 10d. post free. *Income Tax, Super-tax and Sur-tax in Eire*, 1940–41. Price 8d., post free. *The Excess Profits Tax. A full detailed Synopsis in Chart form.* Price 2s., post free. *The National Defence Contribution. A full detailed Synopsis in Chart form.* Price 1s. 1d., post free. By CHAS. H. TOLLEY, A.C.I.S., F.A.A. London: Waterlow and Sons, Ltd.

Insurance Shares as an Investment. Being an analysis of the leading companies' reports and accounts for 1939. Compiled and edited by T. WHEELOCK. 1940. pp. 77. London: P. W. Cooper & Co., Ltd. Price 5s. net.

COUNTY COURT CALENDAR FOR AUGUST, 1940.

The following are dates of sittings which arrived too late for inclusion in the "Calendar" in last week's issue:—

Circuit 43—Middlesex.

HIS HON. JUDGE LILLEY.

HIS HON. JUDGE DRUCQUER (Add.).

Marylebone, 1, 8, 15, 22, 29.

Notes of Cases.

HOUSE OF LORDS.

Southern Foundries (1926), Ltd. and Others *v.* Shirlaw.

Viscount Maugham, L.C., Lord Atkin, Lord Wright, Lord Romer and Lord Porter. 22nd April, 1940.

Company—Agreement appointing managing director for ten years—New articles of association subsequently adopted—Other company holding virtually all company's shares—Empowered to remove any of company's directors—Power exercised against managing director—Right to damages.

Appeal from a decision of the Court of Appeal (83 Sol. J. 357; 55 T.L.R. 611).

By the articles of association of Southern Foundries (1926), Ltd., a director had a right to resign (art. 89), a managing director was subject to the same provisions as to removal and resignation as the other directors "subject to the provisions of any contract between him and the company" (art. 91), and a director could be removed by extraordinary resolution (art. 105). In 1933 the company made an agreement with the plaintiff that he should become their managing director for ten years. He was to have a claim for damages if his "tenure of office" were determined by a winding-up of the company (cl. 9). In 1936 Federated Foundries, Ltd., having acquired nearly all the shares in Southern, new articles of association were adopted. By art. 8 Federated were given power to remove from office any director of Southern. The appointment of managing director was also made "subject to determination if he ceases from any cause to be a director." In 1937 Federated exercised their power to remove the plaintiff from being a director of Southern, and he accordingly ceased to be managing director. In an action by him against Southern for wrongful dismissal and against Federated for wrongfully procuring Southern to dismiss him, Humphreys, J., awarded £12,000 damages. The Court of Appeal (Greene, M.R., dissenting) affirmed that decision. The company appealed. (*Cur. adv. vult.*)

Lord Atkin said that the ten years' contract of employment of the respondent was dependent on the managing director's continuing to be a director. The continuance of the directorship was a concurrent condition. The arrangement between the parties appeared to be exactly described by Cockburn, C.J., in *Stirling* v. *Maitland* (1864), 5 B. & S., 840, at p. 852: "If a party enters into an arrangement which can only take effect by the continuance of an existing state of circumstances." The party, the chief justice said, impliedly undertook in such circumstances to do nothing of his own motion to put an end to the state of circumstances under which alone the arrangement could be operative. He (Lord Atkin) would not so much base the law on an implied term as on a positive rule of the law of contract that conduct of either party which could be said to amount to his of his own motion bringing about the impossibility of performance was in itself a breach. Having referred to the judgment of Kennedy, L.J., in *Measures Bros., Ltd.* v. *Measures* [1910] 2 Ch. 248, at p. 258, his lordship said that he could not agree with the view of the Master of the Rolls that the parties must be taken to have agreed that the term of the contract, though expressed to be ten years, was liable to be determined by any cause, including the will of either party expressed in accordance with the articles, and that such a determination could therefore not constitute a breach. He (Lord Atkin) agreed with Humphreys, J., the majority of the Court of Appeal and with all their lordships in thinking that if during the term the respondent had given notice of resignation or the company had exercised their power of removal under the articles, either would have committed a breach of contract. The question remaining was whether, if the removal by the company would have been a breach, the removal under the altered articles by Federated was a breach by the appellants. On that issue all the Lords Justices were agreed, but all their lordships were not. The question was clearly not so simple as that of removal by the appellants, but he (Lord Atkin) thought that the result must be the same. The altered article which gave power to Federated to remove from office any director of the appellants was, when analysed, a power to Federated to terminate a contract between the appellants and their managing director. It was an act which bound the appellants as against their promise; and if it were a wrong to the respondent if done by the appellants, it must surely be a wrong to him if done by Federated, who derived their power to do the act from the appellants only. It could not be said that the appellants committed any breach by adopting the new articles, but when Federated acted on the power given to them by those articles they bound the appellants if they acted in such a way that action by the appellants on the same articles would be a breach. The appeal should be dismissed.

Viscount Maugham, L.C., who delivered the first judgment, said, dissenting, that it would have been a breach for the appellant company to remove the respondent from his directorship during the ten years, but that it would be unwarrantable to imply a term that the appellants' articles should not be altered, however essential in the interests of the company, merely because such an alteration might possibly lead at some future date to the termination of the respondent's position as a director. He (the Lord Chancellor) could not agree with MacKinnon, L.J.'s view that the court could properly imply a term in the agreement that the company should not exercise *or create* any right to remove the respondent. Nor could he agree with Goddard, L.J., that it was a breach of the agreement for the appellants to put it in the power of another person in different circumstances to remove the respondent. With regard to the act of Federated in removing the respondent, the appellants never had influence or power over that company. Federated held all the shares in the appellant company. The respondent plaintiff nowhere alleged that the adoption by the appellants of the new articles was a breach of their contract with him. In this contract between a person and a limited company there was an implied term that the company by altering their articles could give to a third party wide powers, including a power to dismiss the company's directors. The appeal should be allowed.

Lord Wright and Lord Porter agreed with Lord Atkin.

Lord Romer agreed with the Lord Chancellor.

Counsel: *Valentine Holmes* and *J. G. Strangman*; *Willink*, K.C., and *Ashworth*.

Solicitors: *Allen & Overy*; *Slaughter & May*.

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]

Noble *v.* Southern Railway Co.

Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter. 18th April, 1940.

Workmen's compensation—Workman's death while disobeying employer's instruction but doing act in connection with employer's business—Employer liable for compensation—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 1 (2).

Appeal from a decision of the Court of Appeal affirming a decision of Judge Sir Gerald Hurst, K.C.

A fireman employed by the respondent railway company was killed one night in August, 1938, by an electric train when walking from his locomotive depot to Norwood Junction Station, from which he was instructed to go by train to East Croydon. He had departed from the recognised safe route and was walking along a highly dangerous route near the rails used by the electric trains. The use of that route by the employees of the railway company was strictly prohibited, a notice having been issued specifying the exact route which had to be taken between the depot and the station. By s. 1 (2) of the Workmen's Compensation Act, 1925, "an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention ... of any orders given by ... his employer ... if such act was done by the workman for the purposes of and in connection with his employer's trade or business." In workmen's compensation proceedings brought by the deceased's widow, the county court judge held that s. 1 (2) did not avail the workman, and that he was bound by *Clarke* v. *Southern Railway Company* (1927), 20 B.W.C.C. 309, to award in favour of the company. The Court of Appeal upheld that decision, and the widow now appealed. (*Cur. adv. vult.*)

Viscount Maugham said that in a case like the present, where death had resulted and no serious and wilful misconduct was alleged, the following three questions must be answered by the court: (1) Did the accident, on all the facts, arise out of and in the course of the employment? (2) If no, was the negative answer due to the fact that when the accident happened the workman was contravening a regulation or order? (3) If yes, was the workman's act done for the purposes of and in connection with his employer's business? It was clear that if the case came within subs. (2) the workman would be entitled to compensation notwithstanding the added risk which he had run by his disobedience. That obviously was the very object of the section in the case where death or serious and permanent disablement was caused by the accident. For that reason the "added peril" test was quite inapplicable to subs. (2); in his opinion it was only useful in its application to subs. (1) if it were a matter of doubt whether a particular act was or was not within a man's employment. In such a case the circumstance that the act in question involved an added peril might help to the conclusion that the act was not intended to be within the scope of the man's employment. The answers to the three questions must be as follows: First, the accident did not arise out of the employment. The man was given a safe route, but chose to take one which was prohibited because of its dangers. Secondly, the answer to the first question was solely due to the circumstance that the accident to the workman occurred while he was contravening the regulations as to his proper route from the engine house to the station. In those circumstances, if there were no prohibition, would the act have been one which arose out of and in the course of the man's employment? The answer must be in the affirmative. The third question must also be answered in the affirmative. It was true that there was no emergency, but there was no suggestion that the workman had deviated from the safe route to fulfil any purpose of his own. He was still on his employer's business and was going to his allotted job. The necessary inference was that he was walking along the line "for the purposes of and in connection with his employer's trade or business." If those views were correct the decision in *Clarke* v. *Southern Railway Company*, *supra*, was erroneous and could not be relied on. The judgment of the Court of Appeal must be reversed and the matter must be remitted to the county court judge, unless the parties agreed, for the purpose of fixing the amount of the compensation.

The other noble lords concurred.

Counsel: *F. W. Beney* and *Neil Lawson*; *Denning*, K.C., and *W. H. Duckworth*.

Solicitors: *Kenneth Brown, Baker, Baker*; *H. L. Smedley*.

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]

COURT OF APPEAL.

English *v.* Western.

Slesser, Clauson and Goddard, L.JJ. 25th April, 1940.

Insurance (motor)—Clause excluding "member of assured's household" from cover—Applicable only to household of which assured the head—Injury to assured's sister through his negligent driving—Insurer not liable to indemnify assured for his liability.

Appeal from a decision of Branson, J. ([1940] 1 K.B. 145; 84 SOL. J. 114).

The plaintiff, English, in April, 1935, when seventeen years old, took out a policy called the British Standard Motor Car Policy, subscribed by Lloyd's underwriters, to cover him for certain risks in respect of a motor-car. The policy was valid and subsisting on the 28th May, when the plaintiff, while driving his car, was involved in an accident resulting in several claims against him. The defendant, who was sued in a representative capacity, settled all the claims arising out of the accident, or indemnified the plaintiff against them, except a claim by his sister. The underwriters contended that that claim came within the exclusion clause in para. 5 of the policy which provided that the underwriters would indemnify the assured against all sums which the assured should become legally liable to pay by way of compensation for " . . . death of or bodily injury to any person (including passengers) caused by . . . the use of the car, but excluding . . . any member of the assured's household . . . carried in . . . the car otherwise than by reason of . . . a contract of employment." At the time of the accident the plaintiff, who was unmarried, and his sister were living at home with their father, who made them allowances. Branson, J., held that the words "member of the assured's household" meant a member of the same household as that of which the assured was a member; that the plaintiff's sister came within those words; and that, accordingly, the plaintiff was not entitled to be indemnified under the policy in respect of her injuries. The plaintiff appealed.

SLESSER, L.J., said that the plaintiff argued that the expression "member of the assured's household," and therefore the limitation of the defendant's liability, only applied to a member of a household of which the assured was the head, and that the exception did not apply to the plaintiff as a member of his father's household supported entirely by his father. In his (his lordship's) opinion, the phrase in question was equivocal; it was capable of either of the constructions contended for, and the policy must be construed on the principles applicable to such a case. The doctrine known as *contra proferentem* should be applied. (His lordship referred to "Macgillivray on Insurance Law," 2nd ed., at p. 1029, where the authorities were set out.) If the defendant could not establish that his construction was the only right one, the plaintiff's must prevail. The appeal must be allowed.

CLAUSON, L.J., agreed.

GODDARD, L.J., dissenting, said that he would have been content to adopt Branson, J.'s judgment as his own. It was true that the expression "assured's household" could be construed in either of two ways; and that, where a proviso was inserted in an insurance policy for the benefit of the underwriters, it must, if ambiguous, be construed more strongly against the underwriters than against the assured. The doctrine *contra proferentem* was, however, limited to the extent that, if there were a good reason for adopting one construction, and no, or very little, reason for adopting the other, the construction should be preferred which afforded good reason for the presence of the proviso. (His lordship referred to the observations of Lord Sumner in *Lake* v. *Simmons* [1927] A.C. 487, at p. 509.) Here was a policy in which the insurers were willing to give the insured an indemnity greater than that which he was obliged by statute to obtain; but the underwriters were not content to grant unlimited cover; the object of the exception was to prevent them from being exposed to the risk of claims by those who might be called "everyday passengers" in the assured's car. To construe the policy in accordance with the plaintiff's contention led to the curious result that, if both father and son had a car, and each were insured by a separate policy, the son would obtain wider cover than the father. That could not have been intended. In his (his lordship's) opinion, the words "assured's household" were meant to exclude from cover the members of the common establishment in which the assured lived. He would dismiss the appeal.

COUNSEL: *B. L. A. O'Malley* (for *N. A. J. Cohen*, on war service); *C. N. Shawcross.*

SOLICITORS: *Edward Betteley, Smith & Stirling; William Charles Crocker.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Brandon *v.* Reidy.

Slesser, Scott and Goddard, L.JJ. 24th April, 1940.

Emergency legislation—Inability to pay rent—Landlord's action for possession—"Immediately"—Debtor not bound to prove ability to pay at any particular future date—Courts (Emergency Powers) Act, 1939 (2 & 3 Geo. 6, c. 67), s. 1 (2) (4).

Appeal from a decision of Oliver, J., in chambers.

The defendant, a surgeon, occupied premises in Harley Street under a lease of twenty-five years from July, 1938, at a rent of £500 a year. Having raised £4,000 by mortgage, he spent that sum and more moneys of his own in redecorating and equipping the premises as consulting rooms for himself, and in order to let them to other practitioners. He also took out an endowment policy at an annual premium of £392 as collateral security for the loan. The defendant had certain family debts. When the war broke out he was managing to run the premises without loss, but thereupon most of the doctors occupying the premises joined His Majesty's Forces and were unable to pay their rents to the defendant, so that he was left running the premises at a loss. The head landlords of the premises were the Commissioners of Crown Lands, to whom the plaintiff, the tenant's immediate landlord, had to pay £350 a year as rent. By a writ issued in November, 1939, the plaintiff sued the defendant for possession of the premises, a quarter's rent and mesne profits from the 29th September, 1939. The action being undefended, judgment was obtained for possession and for mesne profits at £41 13s. 4d. a month. On the plaintiff's application under the Courts (Emergency Powers) Act, 1939, for leave to proceed to enforce the judgment, the Master made an order suspending the order for possession for so long as the defendant paid the plaintiff £10 a month. Oliver, J., affirmed that decision and the plaintiff now appealed. It was contended for him that a yearly sum of £340, which the defendant had available, should be applied in paying the rent due to the plaintiff, interest on the mortgage and the premium on the policy. By s. 1 (2) of the Act of 1939, " . . . a person shall not be entitled, except with the leave of the appropriate court (*a*) to proceed to exercise any remedy . . . by way of . . . (ii) the taking of possession of any property . . ." By s. 1 (4), "If . . . the appropriate court is of opinion that the person liable to . . . pay the rent . . . is unable immediately to do so by reason of circumstances directly or indirectly attributable to " [the war] " the court may refuse . . . the exercise of that . . . remedy."

GODDARD, L.J., giving the judgment of the court, said that counsel for the plaintiff argued that the Act of 1939 provided for a moratorium and that it was not intended to release persons from their obligations for all time; that the word "immediately" in s. 1 (4) showed that Parliament was contemplating the case of a man who could not pay at the moment, but would be able to do so in the future; that the defendant's position was such that it was impossible to suppose that he would be able to pay; and that the court had therefore no jurisdiction to grant relief. The court was not prepared to construe the subsection so narrowly. To do so would be seriously to circumscribe the beneficial intention which the Act showed the Legislature to have contemplated. The presence of the word "immediately" meant no more than that, if the debtor showed that he could not pay through circumstances attributable to the war at the time when the application to enforce judgment was made, he could ask for relief, and, while the court could take into account many matters, as was shown by *A* v. *B* [1939] 1 K.B. 27; (1939), 83 SOL. J. 870, it was not incumbent on the debtor to show that at any or any particular time he would be able to pay. The court must exercise its discretion, bearing in mind that it was open to either party to ask the court for a review of the circumstances and a new order for payment. The mortgagees here were not before the court and the court thought that the attention of the rule-making authority under the Act might be called to the particular case where there were three interested parties. In such a case, with three parties vitally interested, it might be well for the court to have all of them before it. It was not fair for the landlord to be held off while the mortgagees got everything; at the same time the tenant was vitally interested in the attitude which the mortgagees might take up, and the court had no certain knowledge of what that attitude was. If the interest on the mortgage or the premium on the policy were not paid, they might take proceedings which might yet have to come before the court. If the tenant had £340 available, that sum should be paid to the plaintiff landlord who himself had to pay £350 a year in respect of the premises. The judge's order must therefore be varied, and the defendant must pay the plaintiff £28 6s. 8d. a month. The court was, however, dealing with the matter only as it then stood, and either party could go back to the court under r. 18 of the Courts (Emergency Powers) Rules, 1939.

COUNSEL: *R. Paget; B. L. A. O'Malley.*

SOLICITORS: *L. A. Hart; Ballantyne, Clifford & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

APPEALS FROM COUNTY COURTS.

Smart Brothers, Ltd. *v.* Pratt and Another.

MacKinnon and Luxmoore, L.JJ., and Tucker, J.
27th June, 1940.

Hire-purchase agreement—One-third hire-purchase price paid—Arrears—Termination of agreement by owners—Written request to return goods qualified by notice to pay off arrears—Valid request within s. 10, Hire Purchase Act, 1938—Proof of adverse possession—Action under s. 12, Hire Purchase Act, 1938 (1 & 2 Geo. 6, c. 53).

Appeal from a judgment for the defendants given by His Honour Judge Trevor, at the Ilford County Court, on 8th April, 1940, in an action for the return of furniture of the value of £26 13s., let under hire-purchase agreements to which the Hire Purchase Act, 1938, applied. The agreements provided that in case of breach of any term the owners might forthwith without notice terminate the hiring and repossess themselves of and remove the goods, or alternatively by written notice they might forthwith absolutely determine and end the agreement and the hiring thereby constituted. The first defendant was the

guarantor of the agreements and the second defendant was his wife and the hirer of the furniture. The hirer being considerably in arrears with her payments, the owners first orally requested the return of the goods, and on the hirer refusing, they sent through their solicitors, on 5th January, 1940, a letter referring to the goods and the arrears, which were then £10 7s., and stating: "You must therefore please treat this letter as a formal notice determining the hiring of the said goods, and that our clients through ourselves hereby request the surrender thereof. Please take notice that unless not later than Tuesday next, the 9th inst., you pay the above-mentioned arrears, immediate proceedings will be commenced against you to recover possession of the goods." Section 10 of the Hire Purchase Act, 1938, provides: "Where, in an action by an owner of goods which have been let under a hire-purchase agreement to enforce a right to recover possession of the goods from the hirer, the owner proves that, before the commencement of the action and after the right to recover possession of the goods accrued, the owner made a request in writing to the hirer to surrender the goods, the hirer's possession of the goods shall, for the purpose of the owner's claim to recover possession thereof, be deemed adverse to the owner. Nothing in this section shall affect a claim for damages for conversion." Section 11 (1) provides that where more than one-third of the hire-purchase price has been paid the owner shall not enforce any right to recover possession of the goods from the hirer otherwise than by action. When the action was begun, more than one-third of the hire-purchase price of the furniture had been paid. The learned county court judge held that the request made in the letter was equivocal and qualified by the implication that if the arrears were paid the hirer might retain the goods, and s. 10 did not authorise such a qualified request. He further held that a hirer was only bound to deliver the goods to the owner at the hirer's own address (*Clements* v. *Flight* (1846), 16 M. & W. 42), and s. 10 did not alter this rule but merely relieved an owner of the burden of strict proof of demand and refusal that lay upon him (*Thorogood* v. *Robinson* (1845), 6 Q.B. 769). This attendance could only be dispensed with where the owners were told that it would be ineffective. As the plaintiffs did not attend, the action failed for that reason also. His Honour also held that on the construction of the two guarantees the action failed against the first defendant even if the action against the second defendant should be held to succeed.

MACKINNON, L.J., said that although the letter of 5th January, 1940, was a conditional request and gave a *locus pœnitentiæ* to the hirer, the effectiveness of the letter as being a request in writing to surrender the goods was not affected. Furthermore it was not required by s. 10 that after the request in writing the owner should make a subsequent visit to the hirer's premises with a van or vehicle to take away the goods. The county court judge should have dealt with the claim and considered it on its merits, pursuant to the discretion vested in him under s. 12 of the Hire Purchase Act, 1938. As the county court judge had intimated that in case he were wrong he would, under s. 12, make an order for the delivery of the goods to be suspended so long as the defendant paid £1 per month, the court would direct, in allowing the appeal, that an order in those terms be substituted for the judgment.

LUXMOORE, L.J., agreed, and said that the requirements of s. 10 were evidential, because if the owner went to the hirer and asked for surrender of the goods and the hirer refused on the ground of s. 11 of the Act, then in a subsequent action by the owner, if s. 10 had not been there, there would be no proof of adverse possession, because the refusal to hand over the possession was due to s. 11. There was no ground for reading into the section any necessity for following up the request in writing with a formal demand for possession. The letter of 5th January, 1940, was an unequivocal demand for surrender of the goods.

TUCKER, J., agreed, and said that he thought that the matter which really troubled the county court judge was whether the request in writing to surrender the goods under s. 10 might be said to be satisfied if the hirer was called upon to send the goods several hundreds of miles by rail to the premises of the owners. On reading the letter as a whole it was quite clear that that difficulty did not arise in this case.

Appeal allowed.

COUNSEL: *G. J. Lynskey*, K.C., and *A. A. Pereira* (for appellants).

SOLICITORS: *Tudor & Rowe.*

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

HIGH COURT—KING'S BENCH DIVISION.

In re Jesty's Avenue, Broadway, Weymouth.

Hawke, Charles and Hilbery, JJ. 17th April, 1940.

Private street works—Provisional apportionment—Expense of lowering gas main—To be borne by inhabitants at large—Public Health Act, 1875 (38 & 39 Vict., c. 55), s. 153—Private Street Works Act, 1892 (55 & 56 Vict., c. 57), ss. 1, 2, 6 and 25.

Appeal by case stated from a decision of Weymouth justices.

Weymouth Corporation proposed to execute certain works in a road not repairable by the inhabitants at large. A provisional apportionment of the proposed expenditure was made on the frontagers and included a sum in respect of "the estimated cost of lowering the gas main already under the street." Certain frontagers having objected that that item should not be included in the apportionment, the matter came before the justices. By s. 1 of the Private Street Works Act, 1892, "this Act . . . shall be construed as one with the Public Health Acts." By s. 153 of the Public Health Act, 1875, "Where . . . any urban authority . . . sink, or otherwise alter the situation of any . . . gaspipes . . . laid in or under any street . . . the expenses of . . . such alteration shall be paid by the urban authority . . ." It was contended for the corporation that s. 153 only applied to streets repairable by the inhabitants at large. The justices, however, were of opinion that the words "any street" must be governed by the definition of "street" in s. 4 of the Act of 1875, and they observed that in *Taylor* v. *Oldham Corporation* (1876), 4 Ch. D. 395, it was stated that the Act expressly called places "streets" whether they were public or private property. Referring also to *Standring* v. *Bexhill Corporation* (1909), 73 J.P. 241, the justices held that the item in question in the apportionment must be struck out. The corporation appealed.

HAWKE, J., said that in his opinion the appeal should be dismissed. The reason for the provision in s. 153 was clear; a gas main laid through a street might pass houses which it did not serve. Even if it served all the houses in the private street it also served many houses in the district which were not in that private street. It was therefore right that the expense in question should be borne by the inhabitants at large, and that reasoning accorded with the plain construction of the relevant statutory provisions.

CHARLES, J., agreed.

HILBERY, J., also agreeing, said that as s. 153 of the Public Health Act, 1875, was, among other sections, to be read with, and was part of, the Private Street Works Act, 1892, under which the corporation were acting, the section must be taken, *prima facie*, to decide the question who was to bear the cost of lowering the gas main. That being so, the question was whether there was any finding of the justices to force the court to the conclusion that that section was displaced so that the matter became one which could be dealt with by a provisional apportionment made pursuant to a resolution under s. 6 of the Act of 1892, the burden thus being placed on the frontagers. There was no such conclusion of fact by the justices, nor had there been any argument which satisfied him (his lordship) that, as a matter of law, the plain provisions of s. 153 were displaced. That being so, s. 153 plainly placed the burden of lowering the gas main on the inhabitants at large, that was, on the corporation as urban authority.

COUNSEL: *Done; Erskine Simes.*

SOLICITORS: *Sharpe, Pritchard & Co.*, for *Percy Smallman*, Town Clerk, Weymouth; *Barnes & Butler*, for *J. W. Miller & Son*, Poole.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Howard Farrow, Ltd. *v.* Ocean Accident and Guarantee Corporation, Ltd.

Macnaghten, J. 17th April, 1940.

Insurance—Contractor covered in respect of damage to property in course of his work—Damage by flood excepted—Overflow of stream during work through negligence of contractor's servants—Contractor held liable for damages—Whether entitled to indemnity under policy.

Special case stated by an arbitrator.

The claimant company were road and sewer builders and contractors. They were insured with the respondent company against compensation which they should become legally liable to pay for accidental damage to property happening in the course of their business and at any place where they were carrying out work. The indemnity given by the policy was expressed not to apply to "(5) liability in respect of injury or damage caused by . . . flood." In 1936 an action was brought against the Lee Conservancy Board for damage to certain premises arising from the fact that a stream had been allowed to overflow its banks. The overflowing was due to a culvert being blocked, which was due to negligence on the part of certain of the claimants' workmen. The claimants were at the time carrying out works for the board, and the blockage was caused by planks which had to be used in that work. The action having been discontinued against the board, the claimants were made defendants, the action and another claim arising out of the same facts ultimately being settled by the claimants by payments totalling £1,650 11s. The claimants having claimed to be indemnified by the insurance company in respect of the sum so paid, the matter was referred to arbitration. The arbitrator found as facts that the overflow of water in the circumstances and in the volume and extent in question might properly be described as a flood, but that it was not caused by an exceptional fall of rain. He left for the opinion of the court the following questions: (1) Did the facts establish that the claimants had come under a legal liability in respect of the damage caused by the overflow of water? (2) Was the damage in respect of which the claimants paid compensation "damage caused by . . . flood" within the meaning of the exception in the policy? It was argued for the claimants that the damage was clearly not within the exception; that, the arbitrator having found that the damage was caused by the negligence of the claimants' workmen, there could not be two separate causes of the same damage, so that flood as a cause was excluded; and that the word "flood" implied something outside human agency. It was argued for the company that, the damage having resulted from flood, it was immaterial that the flood resulted from negligence.

MACNAGHTEN, J., said that in his opinion the damage was caused by flood and by nothing else. The flood itself was caused by the negligence

of the claimants' servants. If the claimants were to succeed, the exception would have to be read as if it stated "flood, unless caused by the negligence of the insured's servants." The claim failed.

COUNSEL: *Samuels*, K.C., and *Valentine Holmes*; *A. T. Miller*, K.C., and *Gerald Thesiger*.

SOLICITORS: *Kenneth Brown, Baker, Baker*; *William Hurd & Son*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Watson *v.* Sutton District Water Co.

Lewis, J. 27th May, 1940.

Water—Householder's temporary absence from house—Request to water undertakers to "cut off" supply—Request complied with by turning off stop-cock—Stop-cock turned on by stranger—Damage to house by flooding—Undertakers liable.

Action for damages for negligence and breach of duty.

The plaintiff was the occupier of a house in the district for which the defendant company were the water undertakers. As the house was to remain unoccupied for a time, her son on her behalf wrote to the company asking them to "cut off" the water supply to the house. The company wrote agreeing to do so and in fact sent an employee who turned off a stop-cock situated in the public street outside the house. The plaintiff's son then went to the house and drained the cistern, pipes and other containers. The stop-cock was housed in a pipe covered by a lid to which no lock was fitted. The tap could easily be operated with either a turnkey or a piece of wood; it was accordingly possible for any stranger to turn it on or off. In fact, while the house was unoccupied, some unauthorised person did, unknown to anyone concerned, turn the stop-cock on again, so that water flowed back into the house, filling the cistern and pipes. A sharp frost having occurred, one of the pipes burst, and the plaintiff's son when he next visited the house found that extensive damage had been caused by flooding. The plaintiff accordingly brought this action, contending that the company had disobeyed the instructions given to them in that they had failed to cut off the water effectively. The defendants contended, *inter alia*, that they had cut off the water in accordance with the instructions given to them.

LEWIS, J., said that in a letter by which the company informed the plaintiff's son that they had "turned off" the supply the company had repudiated responsibility for any damage which might be caused, *inter alia*, by frost. That showed that the company were well aware of the importance of not leaving water in the pipes of the house. The evidence showed that the stop-cock, although in a certain sense in the control of the company, was part of the householder's property; but any third person could also operate the stop-cock without difficulty. In the various documents passing between the parties the expressions "turn off," "disconnect," "cut off" and "shut off" had been used. It was suggested that they were synonymous. In letters which the company wrote to consumers by way of final application for payment of bills for water they threatened to cut off the supply in the event of non-payment, and stated that the "expense of cutting off the water" would be payable by the consumer. The company were there referring to something more than the simple turning off of the stop-cock. The plaintiff's son, no doubt, was quite unaware by what process the company would "cut off" the supply; he merely wished to make sure that the company would take effective steps to ensure that no water should enter the house from the main until further orders. The company had clearly not taken sufficient steps to secure that result. Could it be said that a water undertaker, when asked to cut off the supply to a house, carried out that request effectively if all that he did was to turn off a tap in the public street which any passer-by could turn on again? There was no reason why the container should not be locked or some method should not be devised to prevent tampering with the tap. Merely to turn off a tap which anyone could turn on again was not a sufficient execution of the mandate, given and accepted, to "cut off" the water. The plaintiff was accordingly entitled to judgment for £145, the amount of the agreed damages, with costs.

COUNSEL: *Shawcross*, K.C., and *H. M. Pratt*; *Beney*.

SOLICITORS: *Reid, Sharman & Co.*; *Spencer, Gibson & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Griffiths *v.* Dalton.

Macnaghten, J. 27th May, 1940.

Cheque—No date filled in—No obligation on banker to honour—Prima facie authority in payee to insert date—To be exercised within reasonable time.

Action tried by Macnaghten, J.

In March, April and June, 1930, the plaintiff Griffiths lent the defendant Dalton, since deceased, sums amounting to £400. For many years previously the deceased, although a man of means, had borrowed money from the plaintiff, repaying him with a bonus of £25 on every £100 advanced. The plaintiff alleged that he had lent the deceased further sums after June, 1930, but Macnaghten, J., refused to accept his evidence to that effect. At some time before February, 1932, the deceased gave the plaintiff a cheque for £750, which was not dated. Between February, 1932, and February, 1933, correspondence passed between the plaintiff and the deceased's solicitors with the purpose of settling the amount owing, and in the course of that correspondence the plaintiff sent to the deceased's solicitors the cheque for £750 by way, as Macnaghten, J., found, of a statement of account. In due course the cheque was returned to the plaintiff's then solicitors, who thereupon filled in the date, the 20th February, 1933, and presented it for payment. The cheque having been returned marked "refer to drawer," the plaintiff in 1933 brought the present action, claiming the £400 lent, alternatively £750 on the cheque. During the years from 1933 to 1939 the plaintiff took no steps to prosecute the action.

MACNAGHTEN, J., said that it was argued for the plaintiff that the date of a cheque was immaterial to the banker, and that if it were the custom among bankers to refuse to honour a cheque unless dated that custom was not in accordance with law. In support of that proposition counsel cited *Hague* v. *French* (1802), 3 B. & P. 173, and *Giles* v. *Bourne* (1817), 6 M. & S. 73. Those cases, however, did not bear out that proposition. They turned entirely on points of pleading; at that time the common law declaration alleged that a bill was made at a certain date and set out all the necessary particulars. Those cases did not support the proposition that an undated cheque was an instrument which the person on whom it was drawn was bound to honour. Although the cheque was given undated, the plaintiff had under the Bills of Exchange Act, 1882, which in that respect affirmed the common law, *prima facie* authority to fill in the date. But he was bound at common law to fill it in within a reasonable time. Whether that had been done was a question of fact. On the facts of the present case it was clear that the reasonable time for filling in the date had expired by February, 193', and that the plaintiff knew that it had expired when he sent it to his solicitors. The covering letter with which he sent them the cheque showed that he sent it not in order to rely on it as such, but a statement of account of moneys due to him from the deceased. When the date was entered on the cheque in February, 1933, the date for doing so had long since expired. There was no authority at that time to fill in the date on the cheque and no liability on the drawer to meet it. The claim on the cheque therefore failed, and there would be judgment for the plaintiff only on the claim for £400.

COUNSEL: *P. T. Rogers*; *Fox-Andrews*.

SOLICITORS: *E. T. Master*, for *Fowell, Sayer & Thorold*, Norwich; *Iliffe, Sweet & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Rules and Orders.

S.R. & O., 1940, No. 1321/L.17.

SUPREME COURT, ENGLAND
PROCEDURE.

THE RULES OF THE SUPREME COURT (No. 4), 1940. DATED JULY 19, 1940.

I, John Viscount Simon, Lord High Chancellor of Great Britain, in exercise of the powers conferred upon me by Section 1 of the Administration of Justice (Emergency Provisions) Act, 1939,* and of all other powers enabling me in this behalf, and with the concurrence of two other Judges of the Supreme Court, do hereby make the following Rules under Section 99 of the Supreme Court of Judicature (Consolidation) Act, 1925† :—

1.—(1) The following words shall be added at the end of Order XXVII, Rule 7 :—

", upon the production of a certificate by the solicitor for the plaintiff or, in the case of a plaintiff in person of an affidavit that the action is not one to which Rule 17 of this Order applies.".

(2) In Order XXVII, Rule 17, the following words shall be inserted at the end of paragraph (*a*) and also at the end of paragraph (*b*) :—

" and to such other person (if any) as the court or a judge may think proper.".

2. The following Rules shall be inserted in the Rules of the Supreme Court, 1883, after Order LIVG and shall stand as Order LIVH.

"ORDER LIVH.

Procedure on Applications under Section 2 (3) of the Public Order Act, 1936.

1. Any application to the High Court under subsection (3) of section 2 of the Public Order Act, 1936, shall be made in the Chancery Division by originating summons *inter partes*, and shall be intituled in the matter of the association by the name (if any) under which it is commonly known, and in the matter of the said Act.

2. The defendants to the originating summons shall be such persons as the Attorney-General shall determine.

3. In the absence of other sufficient representation, the court or a judge may appoint the Official Solicitor to represent any interests which in the opinion of the court or judge ought to be represented on any inquiry directed under the subsection aforesaid.

4. The Rules of the Supreme Court for the time being in force and the practice and procedure of the Chancery Division shall apply."

3.—(1) In the year 1940 there shall be no Long Vacation and the Trinity Sittings of the Court of Appeal and of the High Court shall terminate on the 11th day of October instead of the 31st day of July.

* 2 & 3 Geo. 6, c. 78. † 15 & 16 Geo. 5, c. 49.

(2) The provisions of this Rule shall have effect notwithstanding anything to the contrary in Rule 1 and paragraph (1) of Rule 4 of Order LXIII.

4. These Rules may be cited as the Rules of the Supreme Court (No. 4), 1940, and shall come into operation on the 29th day of July, 1940.

Dated the 19th day of July, 1940.

Simon, C.

We concur.

Hewart, C.J.
A. C. Clauson, L.J.

War Legislation.

(*Supplementary List, in alphabetical order, to those published week by week in* THE SOLICITORS' JOURNAL, *from the 16th September, 1939, to the 27th July, 1940.*)

PROGRESS OF BILLS.

ROYAL ASSENT.

The following Bills received the Royal Assent on Thursday, 25th July :—

Merchant Shipping (Salvage).
Mid-Wessex.
Newcastle-upon-Tyne and Gateshead Gas.
Unemployment Insurance.

HOUSE OF LORDS.

Emergency Powers (Defence) (No. 2) Bill [H.C.].
Read Third Time. [31st July.

Workmen's Compensation (Supplementary Allowances) (No. 2) Bill [H.C.].
Read First Time. [30th July.

STATUTORY RULES AND ORDERS.

No. 1152. **Acquisition and Disposal of Motor Vehicles** Order, July 18
No. 1344. **Agricultural Workers,** England and Wales (Holiday Period) Order, July 17.
No. 1326/L.19. **Chancery of Lancaster** Rules (No. 1), July 10.
No. 1302. **Control of the Cotton Industry** (No. 9) Order, July 23.
No. 1343. **Control of Machine Tools** (No. 2) Order, July 25.
No. 1312. **Control of Magnesium** (No. 1) Order, July 20.
No. 1309. **Control of Pyrites** (No. 1) Order, July 19.
No. 1328. **Defence** (General) Regulations, 1939. Order in Council, July 24, 1940, adding Regulations 32B, 42C, 60E and 79AA and amending Regulations 4, 4A, 7, 10, 18C, 32A, 39A, 72, 88B and 101, and the Second Schedule.
No. 1329. Defence (Finance) Regulations, 1939. Order in Council, July 24, 1940, adding Regulation 2A.
No. 1330. Defence (Agriculture and Fisheries) Regulations, 1939. Order in Council, July 24, 1940, adding Part IX (Milk Marketing).
No. 1315. **Egyptian Tonnage** (Amendment) Order in Council, July 17.
No. 1317. **Employment of Aliens in British Ships** (No. 2) Order, July 20.
No. 1331. **Export of Goods** (Control) (No. 27) Order, July 24.
No. 1332. Export of Goods (Control) (No. 28) Order, July 24.
No. 1325. **Factories** (Medical and Welfare Services) Order, July 16.
No. 1334. **Huddersfield** (Extension of Time) Order, July 19.
No. 1320. **Limitation of Supplies** (Miscellaneous) (No. 3) Order, July 23.
No. 1338/S.57. **National Health Insurance,** Employments (Exclusion and Inclusion) Amendment Order (Scotland) (No. 2), July 6.
No. 1319. **Naval Permits** (Fees) Order, July 22.
No. 1318. **Prices of Goods** (Permitted Increase) (No. 3) Order, July 19.
No. 1148. **Registration** (Former Aliens) Order, July 4.
No. 1333. Registration and Control of Agricultural Contractors Order, July 17.
No. 1346. **Regulation of Payments** (General Exemptions) (Amendment) Order, July 26.
No. 1347. Regulation of Payments (Portuguese Empire) Order, July 26.
No. 1348. Regulation of Payments (Hungary) Order, July 26.
No. 1321/L.17. **Supreme Court** Rules (No. 4), July 19.
No. 1323/L.18. Supreme Court, Long Vacation (1940), Order in Council, July 17.
No. 1181. **Tea** (Rationing) Order, July 6. Corrigendum.
No. 1339. **Tees Conservancy Commission** (Increase of Charges) Order, July 18.
No. 1345. **Unmanufactured Tobacco** (No. 3) Order, July 25.

Copies of the above Bills, S.R. & O.'s, etc., can be obtained through The Solicitors' Law Stationery Society, Ltd., 22, Chancery Lane, London, W.C.2, and Branches.

Legal Notes and News.

Notes.

The Home Office has announced that Mr. Justice Asquith will be Chairman of the Advisory Committee which the Home Secretary has, with the authority of the War Cabinet, decided to appoint to advise him on questions connected with the internment of enemy aliens.

A direction in an Edinburgh woman's will that £1,000 be set aside from her estate of over £13,000 and invested to provide a weekly supply of fresh flowers for the graves of her mother and herself was held not to be valid in the Court of Session, Edinburgh. The Lord Justice Clerk said he considered the bequest was extravagant.

Wills and Bequests.

Mr. Frederick Edward Kennedy, solicitor, of Cavan, left personal estate in England and Eire of £23,280.

Mr. Philip Raynsford Longmore, solicitor, of Hertford, left £61,777, with net personalty £59,864. Subject to a life interest he left £2,000 to Haileybury College for founding a scholarship or scholarships; £2,000 similarly to The Law Society for the benefit of articled clerks articled to solicitors practising in Hertfordshire; and £500 to Hertford County Hospital.

Alderman Francis Joseph Poole, solicitor, of Elworth, Sandbach, left £34,721, with net personalty £28,248.

Stock Exchange Prices of certain Trustee Securities.

Bank Rate (26th October, 1939) 2%. Next London Stock Exchange Settlement, Thursday, 15th Aug., 1940.

	Div. Months.	Middle Price 31 July 1940.	Flat Interest Yield.	‡ Approximate Yield with redemption.
ENGLISH GOVERNMENT SECURITIES.			£ s. d.	£ s. d.
Consols 4% 1957 or after	FA	107½	3 14 5	3 7 8
Consols 2½%	JAJO	72⅝	3 8 9	—
War Loan 3% 1955–59	AO	100½	2 19 8	2 19 2
War Loan 3½% 1952 or after	JD	99⅝	3 10 2	—
Funding 4% Loan 1960–90	MN	110½	3 12 5	3 5 6
Funding 3% Loan 1959–69	AO	97	3 1 10	3 3 2
Funding 2½% Loan 1952–57	JD	96	2 17 4	3 1 2
Funding 2½% Loan 1956–61	AO	90⅝	2 15 1	3 2 2
Victory 4% Loan Average life 21 years	MS	109½	3 13 1	3 7 2
Conversion 5% Loan 1944–64	MN	108⅞	4 11 11	2 6 3
Conversion 3½% Loan 1961 or after	AO	100½	3 9 10	3 9 8
Conversion 3% Loan 1948–53	MS	100⅜xd	2 19 6	2 17 7
Conversion 2½% Loan 1944–49	AO	99	2 10 6	2 12 8
National Defence Loan 3% 1954–58	JJ	100⅛	2 19 10	2 19 7
Local Loans 3% Stock 1912 or after	JAJO	85½	3 10 2	—
Bank Stock	AO	325	3 13 10	—
Guaranteed 3% Stock (Irish Land Acts) 1939 or after	JJ	85	3 10 7	—
India 4½% 1950–55	MN	107½	4 3 9	3 11 11
India 3½% 1931 or after	JAJO	91⅝	3 16 3	—
India 3% 1948 or after	JAJO	79¼	3 15 8	—
Sudan 4½% 1939–73 Average life 27 years	FA	107	4 4 1	4 1 3
Sudan 4% 1974 Red. in part after 1950	MN	105	3 16 2	3 8 1
Tanganyika 4% Guaranteed 1951–71	FA	105	3 16 2	3 8 1
Lon. Elec. T. F. Corpn. 2½% 1950–55	FA	89	2 16 2	3 9 1
COLONIAL SECURITIES.				
*Australia (Commonwealth) 4% 1955–70	JJ	100¼	3 19 7	3 19 1
Australia (Commonwealth) 3½% 1964–74	JJ	88	3 13 10	3 17 10
Australia (Commonwealth) 3% 1955–58	AO	86	3 9 9	4 2 4
*Canada 4% 1953–58	MS	110½	3 12 5	3 0 3
New South Wales 3½% 1930–50	JJ	94	3 14 6	4 5 8
New Zealand 3% 1945	AO	94½	3 3 6	4 7 10
Nigeria 4% 1963	AO	104	3 16 11	3 14 9
Queensland 3½% 1950–70	JJ	93	3 15 3	3 18 1
*South Africa 3½% 1953–73	JD	98½	3 11 1	3 11 7
Victoria 3½% 1929–49	AO	95	3 13 8	4 3 8
CORPORATION STOCKS.				
Birmingham 3% 1947 or after	JJ	79⅛	3 15 6	—
Croydon 3% 1940–60	AO	91½	3 5 7	3 12 1
Leeds 3½% 1958–62	JJ	94	3 9 2	3 13 1
Liverpool 3¼% Redeemable by agreement with holders or by purchase	JAJO	92	3 16 1	—
London County 3% Consolidated Stock after 1920 at option of Corporation	MJSD	79	3 15 11	—
*London County 3½% 1954–59	FA	99	3 10 8	3 11 5
Manchester 3% 1941 or after	FA	79½	3 15 6	—
Manchester 3% 1958–63	AO	91½	3 5 7	3 10 10
Metropolitan Consolidated 2½% 1920–49	MJSD	96	2 12 1	2 19 10
Met. Water Board 3% "A" 1963–2003	AO	82½	3 12 9	3 14 5
Do. do. 3% "B" 1934–2003	MS	84½	3 11 0	3 12 7
Do. do. 3% "E" 1953–73	JJ	88	3 8 2	3 12 7
Middlesex County Council 3% 1961–66	MS	92	3 5 3	3 9 5
*Middlesex County Council 4¼% 1950–70	MN	105½	4 5 4	3 15 4
Nottingham 3% Irredeemable	MN	80	3 15 0	—
Sheffield Corporation 3½% 1968	JJ	97½	3 11 10	3 12 11
ENGLISH RAILWAY DEBENTURE AND PREFERENCE STOCKS.				
Great Western Rly. 4% Debenture	JJ	102	3 18 5	—
Great Western Rly. 4½% Debenture	JJ	107½	4 3 9	—
Great Western Rly. 5% Debenture	JJ	112½	4 8 11	—
Great Western Rly. 5% Rent Charge	FA	109½	4 11 4	—
Great Western Rly. 5% Cons. Guaranteed	MA	105½xd	4 14 9	—
Great Western Rly. 5% Preference	MA	79 xd	6 6 7	—

* Not available to Trustees over par.
‡ In the case of Stocks at a premium, the yield with redemption has been calculated at the earliest date; in the case of other Stocks, as at the latest date.